

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of) MM Docket no, 96-116
HOMETOWN MEDIA, INC.)
For Renewal of License) File No. BR-950601B9
for Station WAYB(AM))
Waynesboro, VA)

ORIGINAL

To: The Commission

REPLY TO EXCEPTIONS

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Respectfully submitted,
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REPLY TO EXCEPTIONS

Hometown Media, Inc. ("Hometown"), by and through counsel and pursuant to Section 1.277(c) of the Commission's Rules hereby files a Reply to Exceptions filed by the Mass Media Bureau ("Bureau") on October 16, 1996. Through its exceptions, the Bureau seeks to overturn the Summary Decision of Administrative Law Judge Joseph Chachkin, FCC 96D-06, released September 17, 1996 ("Summary Decision") granting the renewal of Station WAYB(AM) to Hometown. The Judge's Summary Decision fully and accurately sets forth the facts of record and correctly applies Commission precedent. It should be expeditiously affirmed. The Bureau's exceptions do not comport with Section 1.276(a)(2) of the Commission's Rules and are, thus, procedurally defective and should be dismissed on this basis. Moreover, the Bureau's "Exceptions" are totally lacking in merit and should be summarily rejected. Finally, simply by filing its "Exceptions" the Bureau may deprive Hometown of the opportunity to ever return this station to the air. In this connection, unless this matter is resolved sufficiently in advance of February 9, 1996, to allow Hometown to return the station to the air, or unless Hometown assumes the risk that the Summary Decision will be affirmed and returns the station to the air in any event, the station's license will expire automatically. See Order of May 17, 1996

implementing Section 403(l) of the Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996). Order, FCC 96-218 (released May 17, 1996). The Judge's Summary Decision should be affirmed for the following reasons:

STATEMENT OF THE CASE

The Judge properly concluded that Hometown had the intent and capability to return WAYB to the air expeditiously and should not be disqualified because it remained off the air for approximately three months without authority.

1. Hometown's renewal application was designated for hearing by Hearing Designation Order (DA 96-813, released May 22, 1996)("HDO") on the following issues:

- (1) To determine whether Hometown Media, Inc. has the capability and intent to expeditiously resume the broadcast operations of WAYB(AM), consistent with the Commission's Rules.
- (2) To determine whether Hometown Media, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal application would serve the public interest, convenience and necessity.

HDO, paragraph 3. In addition, the HDO provided that, in the event that it is determined that a grant of Hometown's renewal would serve the public interest convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. HDO at paragraph 4. On July 11, 1996, Hometown filed a Motion for Summary Decision seeking a favorable resolution of the designated issues. On July 16, 1996, a prehearing conference was held, at which time Hometown was given permission to supplement its Motion for Summary Decision (Tr. 27). The Supplement to Motion for Summary Decision was filed on the next day, July 17, 1996.

2. Hometown demonstrated, inter alia, that its principal, Phillip Showers had acquired

WAYB and returned it to the air on September 1, 1994. After experiencing six months of operating losses and a number of unanticipated expenses, Showers took the station off the air on March 17, 1995. Prior to going silent, Showers filed a request for Special Temporary Authority to remain silent. This authority expired on February 16, 1996. Earlier, beginning in August 1995, Showers began negotiating with Randall Fields and Brenda Merica, local residents and experienced broadcasters, to sell the station to them. These negotiations were prolonged by a number of matters including negotiations with Hometown's major creditor, Kenneth Edwards, and negotiations by Fields and Merica to acquire permission to use the tower. Mr. Edwards had previously, along with a group of local businessmen, sought to purchase the station from Hometown, but agreed to step aside and to assist Mr. Fields and Ms. Merica. These negotiations culminated on May 24, 1996, with an agreement to transfer the assets and assign the license to the company formed by Fields and Merica, Valley Communications L.C. ("Valley"). Under this plan, Hometown will return the station to the air and assign the license to Valley. Mr. Edwards, the major creditor, will lease all the broadcast equipment to Hometown for a renewable one year period or until the license is assigned to Valley. In addition, Hometown will enter into an LMA with Valley for a renewable one year term or until the assignment to Valley is approved pursuant to which Valley will operate the station subject to Mr. Showers' ultimate authority and control. Hometown supported its Motion for Summary Decision and the Supplement with the statements, all made under penalty of perjury, of Mr. Showers, Mr. Fields, and Mr. Edwards. In addition, Hometown submitted the notarized statement of Schuyler M. Giles, the Manager of the City of Waynesboro, stating, inter alia, that the city needed this station and urging the Commission to permit the Mr. Fields and Ms. Merica to return the station to the air. Hometown demonstrated

that the public interest would be served by a grant of summary decision since it would permit the renewal of WAYB's license and the speedy resumption of service to the public, the assignment to qualified and experienced, local broadcasters, and the repayment of innocent creditors.

3. The Bureau filed an opposition to Hometown's motion and a counter motion agreeing that the case should be summarily resolved, but contending it should be resolved adversely to Hometown. In support of its motion, the Bureau simply demurred, characterizing Hometown's predesignation efforts as dilatory and contending that the facts required the denial of WAYB's renewal. The Bureau failed to cite any case where a license renewal was denied under similar circumstances.

4. The Judge granted summary decision setting forth the facts completely and accurately. With regard to Issue 1 involving whether Hometown would expeditiously return the station to the air, he concluded that Hometown's motion evidences a plan which will permit Station WAYB to return to the air expeditiously. The Judge noted that the plan appears to be similar to that approved by the Commission in American Music Radio, Inc., 10 FCC Rcd 8769 (1995). Finally, the Judge granted the renewal "subject to the condition that the station SHALL RESUME operations on or before January 15, 1997." With regard to Issue 2, whether Hometown violated Sections 73.1740 and 73.1750 of the Commission's Rules, the Judge determined that Hometown did not violate Section 73.1740 and that its violation of 73.1750 was inadvertent and of short duration. Consequently, the Judge determined that the violation was not disqualifying citing Video Marketing Network, Inc., 10 FCC Rcd 7611, 7613 (MMB 1995) and Cavan Communications, 10 FCC Rcd 2873 (ALJ 1995).

QUESTIONS OF LAW PRESENTED

- 1. Whether the Administrative Law Judge properly concluded that Hometown has the capability and intent to resume broadcast operations expeditiously.**
- 2. Whether the Administrative Law Judge properly concluded that Hometown's violation of Section 73.1740 was inadvertent, of short duration and does not impact adversely upon Hometown's basic qualifications.**
- 3. Whether the Administrative Law Judge properly concluded that a grant of Hometown's renewal will serve the public interest, convenience and necessity.**

ARGUMENT

THE ADMINISTRATIVE LAW JUDGE PROPERLY CONCLUDED THAT HOMETOWN HAS THE CAPABILITY AND INTENT TO RESUME BROADCAST OPERATIONS EXPEDITIOUSLY.

5. The Bureau's attack on the Judge's determination that Hometown has the capability and intent to resume broadcast operations expeditiously is unsupported by the record and, in several respects, actually contrary to the record. Thus, the Bureau incorrectly faults the Judge for focusing on the licensee's post-designation record. The Judge carefully and fully reviewed the record prior to designation as well as steps taken since the case was designated for hearing in May 1996. See, e.g., Summary Decision, para.'s 5 and 6. The Bureau also contends, while conceding that Hometown was not the licensee of the station at the time, that the Judge should have considered the fact that the station was silent since 1990 or 1991 in resolving this issue. The Bureau cites no authority for this astonishing assertion and none exists. Clearly, Hometown is not responsible for the station being silent prior to the time it became the licensee. Nor can the licensee be faulted for not returning the station to the air during the pendency of this renewal hearing. Therefore, the relevant period in terms of measuring the station's silence is from March 1995 to May 1996, slightly more than one year. Significantly, Hometown had authority to remain silent for all but three months of this period (February 16 - May 22, 1996).

6. The Bureau also mischaracterizes the record in asserting that Hometown did virtually nothing to return the station to the air prior to designation for hearing. It states, "Now that the Bureau has expended resources preparing and issuing a designation order in this case, the licensee suddenly claims it has discovered a buyer." Exceptions, p. 5. One could question the wisdom of expending any resources on designating silent stations for hearing in light of the impact of Section 403(l) of the Telecommunications Act of 1996, supra, and the absolute deadline of February 9, 1997, by which all silent stations who have been off the air for a year must resume operations or automatically lose their license. This, of course, is a matter within the discretion of the Bureau. However, if the Commission departs from a consistent policy, it must provide an explanation of its change in direction. See, e.g., National Black Media Coalition v. FCC, 775 F.2d 342, 344 (D.C. Cir. 1985). Furthermore, the Commission must provide an adequate explanation before it treats similarly situated parties differently. New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 166 (D.C.Cir. 1987) and Melody Music v. FCC, 345 F.2d 730 (D.C.Cir. 1965). In this connection, the Bureau recently supported the grant of a renewal in a similar situation albeit with a short term. See, David Lee Communications /nc., FCC 94D-3, (ALJ, 1994) attached to Hometown's Supplement to Motion for Summary Decision. Despite the fact that the David Lee ruling was attached to Hometown's supplemental motion, the Bureau has never made any attempt to explain the conflicting positions it has taken in these two cases.

7. Finally, to state that the licensee has suddenly claimed that it has discovered a buyer is a mischaracterization of the record in this proceeding. The record shows and the Judge properly found that Hometown has been negotiating the sale of the station, first with Mr. Edwards and his group beginning in the spring of 1995, and then with Mr. Fields and Ms. Merica beginning in

August 1995. This is no sudden claim, but a long and orderly effort to return the station to the air, pay off creditors and serve the public interest, fully and completely documented in this record. The Bureau has submitted nothing to contradict these facts and should not be permitted to misstate the record.

8. In its final challenge to the Judge's Summary Decision, the Bureau notes that it has long been the policy of the Commission to defer action on an assignment application until a renewal has been granted. It then contends that the sole purpose of the LMA proposed by the parties is to avoid this policy. Again, the Bureau's position is without support in either fact or law. As the Judge correctly found, the purpose of the LMA was to permit the station to return to the air expeditiously. Both the LMA and the lease of the equipment have a term of one year which are renewable. Neither is conditioned on the grant of the assignment to Valley. Thus, the station will resume operation whether the assignment application is granted or not. See Summary Decision, para. 12. Moreover, as the Judge correctly found, this arrangement appears to be similar to that approved by the Commission in American Music Radio, 10 FCC Rcd 8769 (1995). The Bureau fails to cite any case in support of its position.

**THE ADMINISTRATIVE LAW JUDGE PROPERLY
CONCLUDED THAT HOMETOWN'S VIOLATION OF
SECTION 73.1740 WAS INADVERTENT, OF SHORT DURATION,
AND DOES NOT IMPACT ADVERSELY UPON
HOMETOWN'S BASIC QUALIFICATIONS**

9. As already noted, the Judge determined that Hometown's admitted violation of Section 73.1740 of the rules was inadvertent and of short duration. As a consequence, he found that the rule violation was not disqualifying and does not impact upon the licensee's basic qualifications.

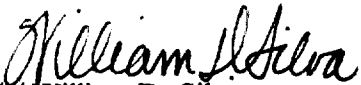
In support, the Judge cited two cases, Video Marketing Network, Inc., 10 FCC Rcd 7611, 7613 (MMB 1995) and Cavan Communications, 10 FCC Rcd 2873 (ALJ 1995). Other than characterizing Hometown as being “dilatory,” the Bureau does not seem to object to this conclusion. Again, it cites no case in support of the proposition that remaining silent for three months without authority warrants disqualification. The Summary Decision correctly resolved this issue and should be affirmed.

**THE ADMINISTRATIVE LAW JUDGE PROPERLY CONCLUDED
THAT A GRANT OF HOMETOWN’S RENEWAL WILL SERVE THE
PUBLIC INTEREST, CONVENIENCE AND NECESSITY**

10. Finally, the Administrative Law Judge properly concluded that a grant of Hometown’s renewal will serve the public interest, convenience and necessity. The Bureau has submitted nothing which would undermine this conclusion. In addition to the reasons cited by the Judge, a grant of this renewal will allow this station to resume service to its community. As Hometown has shown, there is a great need for this local service and the community supports the licensee in its efforts to return this station to the air. In addition, this grant will allow innocent creditors to be paid and provide Waynesboro with its last chance for local service on this channel. “The purpose of [a] summary decision rule, in its broadest application, is to avoid a useless hearing.” Weyburn Broadcasting Limited Partnership, 6 FCC Rcd 1262, 1263 (Rev. Bd. , 1991). The facts in this case are not in dispute and have been fully and completely set forth by the Presiding Judge. The Judge has also applied precedent to these facts correctly. In sum, the Bureau has utterly failed to demonstrate either factual or legal error and its exceptions should be summarily and expeditiously denied.

WHEREFORE, the premises considered, the Exceptions filed by the Mass Media Bureau should be denied and the Summary Decision affirmed.

Respectfully submitted,
HOMETOWN MEDIA, INC.


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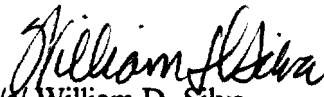
October 23, 1996

CERTIFICATE OF SERVICE

I, William D. Silva, certify that on this 23rd day of October, 1996, I have hand-delivered a copy of the foregoing REPLY TO EXCEPTIONS to the following persons:

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